

The Constitutional Mandate for Judge-Made-Law and Judicial Activism: A Case Study of the Matter of Elizabeth Vaah v. Lister Hospital and Fertility Centre

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Abstract: The case of Elizabeth *Vaah v. Lister Hospital and Fertility Centre* presents many compelling ethical issues. These include the Physician-Patient relationship, ownership of Health Records and the fiduciary duties of the Physician to the patient. It also questions the pro-active approach of the Court in Ghana regarding the imposition of fiduciary duties on medical staff, and the remedies available for breach of such fiduciary duty. Lastly, it investigates whether judicial activism should be accepted as the inevitable consequence of the administration of justice in Ghana. We agree with the outcome of the *Vaah* case that Elizabeth Vaah is entitled to a copy of her medical record from Lister Hospital. We however disagree with the approach used in formulating the decision. The decision would open the floodgate for further litigation by patient's counsel seeking patient records that may not even exist. The decision would place an additional burden on the already severely challenged healthcare delivery system in Ghana. This investigative study consisted of a literature and documentary review of case law, the 1992 Constitution of Ghana and other medico-legal writings from Ghana and other common-law jurisdictions on the issue of the production of patient records. An electronic internet search was conducted with carefully designed phrases like, "medical malpractice in Ghana", "judicial activism", "medical malpractice cases involving refusal to release medical records", "patient request of medical records resulting in court cases". The study revealed that the decision of the court was based on precedents that did not support the factual basis of *Vaah v. Lister* and may weaken *Vaah v. Lister* as a competent precedential case. It also showed that the national legal framework for the Physician-Patient relationship is weak. There is the lack of national legislation on the capture, storage and mining of health information. This presents a complicated adjudicatory framework for the enforcement of the law against the abuse of privacy and the right to patient's health information. Therefore, the law on privacy and health information should be developed to enhance trust in the healthcare delivery system of Ghana.

Keywords: Health information, access to medical records, medical malpractice, judicial activism, Ghana.

INTRODUCTION

In many former British colonies such as the United States of America and Ghana, judge made law through precedents established in court decisions have come to represent a large body of the laws of those nations. This is sustained by the theory of *stare decisis* or stand by the decided matter. Judge made law refers to cases where the judge goes beyond existing law and makes new law, colored by the judge's personal bias of a matter before the court. Such cases may contain legal doctrine established by the court's decision rather than by statutory law. The case of Elizabeth *Vaah v. Lister Hospital and Fertility Centre** presents many compelling legal and medico-ethical issues, including the Physician-Patient relationship, ownership of Health Records

and the privacy concerns of patients [1]. In Ghana, judge made law is a source of ever expanding law. The judiciary is given enormous powers by the 1992 Constitution of Ghana beginning from article 125 (1) which states that:

"Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution".

This is further supported by Article 125 (2) of the constitution, which states that

"The citizens may exercise popular participation in the administration of justice, through the institutions of public and customary tribunals and the jury and assessor systems".

* Elizabeth Vaah v. Lister Hospital and Fertility Centre (Suit No. HRCM 69/10), Fast Track Court, High Street, Accra, Ghana. On 18-05-2010, the applicant, Elizabeth Vaah, by motion invoked the jurisdiction of the Superior

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Court of Judicature, in the High Court of Justice (Human Rights Division) in Accra before his Lordship, Justice Uter Paul Dery, High Court Judge. This was pursuant to articles 21 (1) (f), 33 (1) of the 1992 Constitution and Order 67 of the High Court (Civil Procedure) Rules, 2004 (C. I. 47) for the following reliefs:

- a. A declaration that a patient is entitled as a matter of right to his or her medical records within the custody of a health service institution subject only to the payment of reasonable fees for the production of copies of the record and any other limitations as recognized by law, and notwithstanding that the patient made statements in public media;
- b. An order compelling the respondent, Lister Hospital and Fertility Centre, to furnish the applicant with her medical records within the possession of the respondent forthwith
- c. Cost.

The citizens of Ghana only rarely get to play this role through jury trials. This makes it even more imperative to check the excesses of the judiciary. The Ghanaian judiciary has not created a roll call system for jury duty where citizens are routinely invited to participate in their own democracy as it exists in the UK and the USA court systems. In a vacuous situation like this, judicial activism often goes unchecked or remains obscure from the majority of the people. Judge made law falls under the sometimes pejorative and other times emulative term of judicial activism [2]. Judicial activism is a term reported to have been first used by Arthur Schlesinger Jr. to the public in a Fortune Magazine article in January of 1947. Schlesinger's article profiled the nine Supreme Court justices of the United States of America, explaining the alliances and divisions between them. The article described some of the justices as "Judicial Activists" and others as "Champions of Self Restraint". A third group of the justices he described as the "Middle Group" [3]. The central question often raised is whether judicial review is supported by a legal doctrine or a mere expression of political power [4]. Embedded in the functions of the judiciary is the notion of judicial review. Judicial review allows a higher court to review the actions of a lower court. It also allows the examination of the actions of the legislative, executive and administrative branches of government to ensure that those actions are in compliance with the provisions of the 1992 Constitution of Ghana. Actions that do not conform to the constitution are declared null and void. The concept of judicial review emerged out of the United States of America in 1803, in a Supreme Court ruling in the case of *Marbury v. Madison* [5]. It is also enshrined in the 1992 Constitution of Ghana. Judicial review is necessary to correct poor interpretation of Constitutional and legislative guarantees and intent by the judiciary [6]. Despite the acceptance of the legitimacy of judicial review in many democracies, the scope of that practice has been intermittently politically controversial and regularly intellectually troubling [7].

Part of that controversy is reflected in the proceduralist approach adopted in the *Vaah v. Lister* matter. There are two forms of accepting judicial review, according to one researcher, namely, "outcomes theorists" which justifies judicial review on the basis of the results it produces irrespective of whether or not it undermines democratic

principles or "proceduralists", which takes the position that so long as there is democratic procedure to the review process, fairness has been ensured [8]. A bad outcome cannot be justified by a good democratic process, neither does a good procedure ensure that substantive rights are protected. In the present case, it would be demonstrated that although the outcome of the *Vaah v. Lister* case was the correct one, the means to arrive at that decision was misdirected and poorly executed. Without the benefit of judicial review, this precedent under the theory of stare decisis would stand and would be applied to cases that could lead to a poor development of case law on the right of patients or clients to their records. This development could have far reaching consequences. Additionally, the judiciary is not an elected body. It is the duty of the people to ensure that the judiciary does not engage in law making where the facts of the case before it does not warrant the interpretation and the conclusions it may draw to avoid judicial activism [9].

The common law has developed over centuries of trial and error of the Judeo-Christian jurisprudence. The common law simply means the unwritten law, especially of England and other commonwealth nations, based on custom and court decisions as distinct from statute law. Judge made law is sometimes referred to as common law and those nations that subscribe to such laws are considered as being part of the common law tradition. The common law is particularly germane where there is no statute law or where the meaning of the existing legislation is not so obvious. In this case, judges have to make sense out of competing factual narratives. The *Elizabeth Vaah v. Lister Hospital and Fertility Centre* is a case in point where there was no specific statute law on which the court could rely.

The Facts of Elizabeth Vaah v. Lister Hospital and Fertility Centre (Suit No. HRCM 69/10)

The facts of the case which was disclosed by two affidavits and which was not disputed by the respondent were as follows:

On or about the 23-10-2010, the applicant, who was then an expectant mother, began receiving antenatal services from the respondent with a view to delivery at the respondent hospital. A financial guarantee was signed to assure the respondent of the readiness of her employers to pay any bills the applicant may owe after delivery. Several tests and scans ran on the applicant and the baby proved that she was carrying a healthy fetus and the baby was perfectly normal. On Monday, 08-03-2010, at about 10 p. m., the applicant's membranes ruptured and she was rushed to the respondent hospital without delay. The next day, Tuesday, 09-03-2010, at about 3:30 p. m., the applicant gave birth to a fresh still-birth baby. A post mortem examination revealed that the applicant's baby died of "multiple organ hemorrhages most probably due to a bleeding diathesis/coagulation defect with the bleeding precipitated by 'trauma' of labor (child birth)". From the post-mortem report, the pathologist is not completely sure what caused the multiple organ hemorrhages. Applicant plans on having another baby in the future and wish to put at

the disposal of any doctor who attends to her, whether in or outside of Ghana, her entire medical records. She, therefore, wished to have access to her medical records at the respondent hospital in order to have complete information on her health status. She, accordingly, caused her solicitors to write to the respondent for a copy of her medical records upon payment of reasonable fees for production of the copies. The respondent acknowledged the applicant's right to the records and indicated that, under normal circumstance, they would have given the report out but it is unwilling to do so because the applicant have spoken in public media about the circumstances in which she gave birth at the respondent hospital. The respondent, therefore, wrote to the applicant informing her that it will only give out the records when compelled by a court or on the orders of the Medical and Dental Council.

The applicant's case is that her fundamental human rights have been violated by the respondent when the latter refused to release her medical records to her. She, thus, seeks redress pursuant to article 33 (1) of the Constitution and order 67 of C. I. 47.

Article 33 (1) of the Constitution provides that:

"Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress."

Order 67 of C. I. 47 provides the procedure for the enforcement of the fundamental human rights. It provides in Rule I thus:

"A person who seeks redress in respect of the enforcement of any fundamental human right in relation to the person under article 33 (1) of the Constitution shall submit an application to the High Court."

The complaint of the applicant is that her fundamental right to information as guaranteed in article 21 (1) (f) of the Constitution has been and is still being violated by the respondent. It provides that:

"All persons shall have the right to ... information, subject to such qualifications and laws as are necessary in a democratic society."

THE ISSUES FOR DETERMINATION

The applicant, therefore, invoked the jurisdiction of the court for an order granting her access to her medical records. The two issues which arose for determination were: Whether the applicant is entitled to her medical records irrespective of having spoken in the public media about the circumstances in which she gave birth at the respondent hospital. The second issue is whether it is only by court order or the order of the Medical and Dental Council that the applicant can get access to her medical records [1]. In this paper, we seek to demonstrate that although judges in Ghana have the constitutional and common law right to add to the laws of the nation through the cases that come before them, their

decisions must meet the strict requirements of the constitution. We would establish that in the case of *Vaah v. Lister*, the court's decision was overly broad and did not necessarily relate to the facts of the case and goes against the common law concept of precedent. The Constitution in Ghana, as it is elsewhere, is the supreme law of the land. It describes what powers government has, as well as those of the citizens and the other branches of government. In rendering a judgment, if the court decision goes beyond the four corners of the case that is before it, the court may have exceeded its constitutional mandate. Such excesses should be checked in order to preserve the strict division of labor and functions among the three branches of government in the interest of good governance, judicial restraint, democracy, transparency, probity and accountability [2].

PROCEDURE

Two main approaches were used in this research. These were internet search and documentary, case law and literature review and analysis. All in all, 30 cases from different common law jurisdictions were reviewed and analyzed and the results summarized and reported as part of this narrative. An electronic internet search was conducted with carefully designed phrases like, "medical malpractice in Ghana," "judicial activism," "medical malpractice involving actual intentionality," "medical malpractice cases involving refusal to release medical records," "medical malpractice and constructive intentionality, refusal to give medical record," "patient request of medical records resulting in law suit," and "overly broad judicial decisions". Although there were many publications on almost all of the search topics, Ghana did not have peer reviewed journal articles on medical malpractice and on constitutional mandate of judge made law and the production of medical records. Granted the issue of the constitutional mandate for judge made law vis-à-vis the production of medical records is not a common research event in the healthcare delivery system in many nations and therefore not surprising if research in the nation has not focused on it as yet. This desk-top review covered pertinent national laws that have primary effects on the physician-patient relationship obtained from the government printers, the Law School and the University of Ghana libraries in Accra. Other published articles, grey literature and abstract on ethics and medical information were also reviewed and analyzed. The study did not review all the cases on medical malpractice in the jurisdictions from which selected cases were chosen for the analysis. The authors are not judges but public health, medical and legal scholars and might have brought the biases of their professions in the review process.

Part A: Legal and Constitutional Analysis

Constitutional Grant for Judge Made Law

The 1992 Constitution, Article 11 (1) states that the laws of Ghana shall comprise of: (a) the Constitution, (d) the existing law and, (e) the Common law. From Articles 125 through 161 the functions and mandate of the judiciary are laid out. The Applicant, Elizabeth Vaah filed her case pursuant to Articles 21 (1) (f) and 33 (1) of the 1992 Constitution together with Order 67 of the High court (Civil Procedure) Rules 2001 (C.I.47). Article 21 (1) (f) states that: *All persons shall have the right to- information, subject*

to such qualifications and laws as are necessary in a democratic society. The central theme of the conflict in *Vaah v. Lister* is that: Vaah wanted, irrespective of the cause of death of her baby, copies of her medical records for future consultations. This request appears to come under the protection of Article 21 (1) (f), but not quite. This is because the kind of information to which Article 21 (1) refers to is not a patient's health records, but public, unrestricted and non-classified information generally available to the citizens of the land in the normal stream of commerce. It can be said that Article 21 (1) (f) does not refer to private and confidential information. Since Article 21 (f) does not indicate the kind of information, the circumstances under which the information may be sought and the criteria for the grant are also not provided. Also the broad interpretation and persuasive approach is limited by the claw back clause thus, 'subject to such qualifications and laws that are necessary in a democratic society'. This is buttressed by the chapter of the constitution within which Article 21 falls, which incidentally deals exclusively with the topic of Fundamental Human Rights and Freedoms. The rest of Article 21 (1) (a) through (g) deals with various personal and public freedoms such as freedom of speech, of thought, of religion, of assembly, of association, of information, and of movement [2].

Taking the rationale of the court together with Article 21 (1) appears to create a correlative duty on doctors to provide the information; otherwise, the right is not a legal right but a privilege. The High Court presided over by His Lordship Justice Uter Paul Dery decided that:

"Article 21 (1) (f) of the Constitution confers the right on the applicant to her medical records subject to such qualifications and laws which are necessary in a democratic society. So, if the respondent is asserting the restriction, it must show that such a restriction is a qualification or law which is necessary in a democratic society [1]."

According to Justice Dery:

"The explanation given in counsel for respondent's submission is not a valid ground at all for restricting the applicant's right to her medical records. A patient is entitled to every (piece) of information from her doctor at her request or the request of anybody duly authorized by her. The record does not have to be given to anybody or person or it must be by a Court order. I am fortified in this opinion by the jurisprudence on the issue from the United States and the European Court of Human Rights [1]."

Therefore, the refusal of *Lister* to provide the patient, Vaal, a copy of her medical records, established a prima facie case of the abuse of the human rights of Vaah, since the right to information was not a privilege but a substantive right. Justice Dery wrote that the only defense *Lister* Hospital could have under the circumstances was "justifiable grounds in law to refuse the applicant of her medical records". In reaching this conclusion, Justice Dery relied also on a Washington, DC, Appellate case, *Emmet v. Eastern Dispensary and Casualty Hospital* [10]. Justice Dery said, he was "fortified in this opinion from the jurisprudence from the United States Court and the European Court of Human Rights". This statement was in reference to his reliance on

both *Emmet v. Eastern Dispensary and Casualty Hospital* and *Julian E. Cannel v. the Medical and Surgical Clinic* [11].

Julian, we believe is a case from the United States court system and not a European Court case since it has a citation typical of the United States of America's courts. *Emmet* was a suit for damages under the Survival Wrongful Death Act of the District of Columbia, Washington. The facts of the case were that Joseph N. Emmet had died while a patient in Eastern. His son, who was the administrator of his estate, claimed that his father, Mr. Emmet, had died due to the negligence of the hospital and the attending physician, which fact the hospital had allegedly concealed. After several demands by the son for his father's medical records, which were futile, the son sued for disclosure, but lost at the lower court. On appeal, the Appeals court ruled that hospitals and doctors had a duty of care to protect patient records but should disclose such records to the patient or legal representative and thus reversed the lower court decision. The second case was *Julian E. Cannel v. the Medical and Surgical Clinic* is also a medical malpractice case involving a surgeon leaving a piece of broken metal in the leg of the Plaintiff, Steve Nelson, and concealing the facts of it as well as refusing to give medical records to Nelson. We found that the facts of both *Emmet v. Eastern* and *Julian v. The Medical* cases were not analogous to *Vaah*. *Vaah* was a simple case for the production or disclosure of patient records. Even if *Vaah* would have brought a wrongful death case against *Lister* at a future date, the facts pled by *Vaah* did not support such an assumption. We found that there was judicial activism on the part of the presiding judge for stretching the factual narrative of *Vaah v. Lister* and bending it to meet the factual basis of *Emmet v. Eastern*, and also *Julian v. The Medical*. Our position is supported by Article 21 (a) which deals with freedom of speech and expression. Article 33 (1) negates the position of the High Court. Article 33 (1) offers that: "where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress". The fundamental human rights implicated in the *Vaah* case arose out of *Lister's* position against *Vaah's* media utterances and not because of *Lister's* refusal to produce her medical records. On the other hand, *Lister's* defense that because the patient had spoken to the media about the nature of the treatment she received from the hospital, they would not give her the medical records was contradictory to the physician-patient relationship [1, 2, 10, 11].

The research further found that the High Court erred by elevating a simple patient's access to medical records to the same height as fundamental human rights and freedoms. The competing equity and contractual issues implicated in the request, makes the conflict a contractual one and not a basic human rights issue. In none of the 30 cases reviewed for this paper from the United States and Canada through UK and Australia mentioned a simple demand for patient record as a constitutional matter. In Australia, for example, the fiduciary cases have been scarce, and the courts have increasingly utilized the doctrine of unconscionability, or turned to the

provisions of the Australian Trade Practices Act for the resolution of the conflict due to the Tort and contractual matters implicated in the relationship. The pro-active approach of the Courts to the imposition of fiduciary duties on hospitals and medical personnel, and to the remedies available for breach of fiduciary duty have been criticized by the bar and academics [12].

There are also apposite cases from other common law jurisdictions that hold the opposite position of the views expressed in *Vaah v. Lister*, namely, *R v. Mid Glamorgan Family Health Services Authority*, *ex parte Martin* and *Breen v. Williams* [13, 14]. The case of *Mid Glamorgan* holds the view that “there is no common-law right of access to medical records and this includes any claims to rights of access in equity.” *Breen* holds that “access to medical records could be denied where that would be in the best interests of the patient.” Patient medical records, whether captured on paper or electronically might be made available to the patient when asked.

National Policy on Access to Patient Records

The Ghana Health Service, (GHS) is the largest provider of health services in Ghana, under the Ministry of Health [15]. In 2010, the GHS produced a policy: “Patient Charter” for its group of government hospitals and clinics. The Patient Charter states that “the patient has the right to a second medical opinion if he or she so desires”. This is the *sine qua non* of modern day patient behavior. In today’s Goggle doctor world, patients often seek more than one medical opinion. This does not, however, imply that the patient has a right to obtain a copy of his or her medical record in order to use it to seek a second opinion. Lister Hospital and Fertility Centre is a private facility which does not fall under the control of GHS and may choose not to follow the GHS’s Patient Charter. In theory, every health facility in Ghana must operate in accordance with the standards defined by the Ministry of Health and the Ghana Health Service but the reality is different. The current legal framework does not mandate any private or public institution to audit the activities and operations of private clinics and hospitals. The Ghana Health Service Patient Charter takes a non-committal position on the issue of patient records and does not make it obligatory to the hospital or physician that the captured patient medical records are to be shared with the patient. By the standard held by *R. v. Dymont*, (1988); *Halls v. Mitchell*, (1928); *Kenny v. Lockwood*, (1932); *Henderson v. Johnston*, (1956); and *Canson Enterprises Ltd. v. Boughton & Co.*, (1991), the patient’s medical record is the work-product of the attending physician who did the recording [16-20]. Although the record is also about the patient, he cannot assume to be a co-owner of that work-product as articulated in a Supreme Court of Canada case *McInerney v. MacDonald* [21]. In that case, a patient made a request to her doctor for copies of her complete medical file. The doctor delivered copies of all notes, memoranda and reports she had prepared herself but refused to produce copies of consultants’ reports and records she had received from other physicians who had previously treated the patient, stating that they were the property of those physicians and that it would be unethical for her to release them. She however, suggested to her patient that she contact the other physicians for release of their records. The patient refused and filed the

suit. The Canadian Supreme Court held that the patient did not have a right to the record themselves but rather a right to the information contained in the records since the dossier was the property of the physician who created it. Other researchers say the hospital or clinic holds such a record in trust and, therefore, has a fiduciary obligation to give to the patient that which the hospital holds in trust. If the information is about a patient, then that patient has a right to that information [22-25].

Availability of Non-Precedential Alternative Resolution of the Conflict

The research found that Justice Dery was perhaps, wrong in relying on the Constitution as well as on *Emmet v. Eastern* and on *Julian v. the Medical*. All that the Judge had to do was to order the records released because Vaah had expectation of joint-ownership of the records with Lister Hospital under the Physician-Patient rubric [10, 11, 26-31]. Alternatively, the judgment could have relied on the Medical and Dental Council’s Guiding Rules on Disclosure, or on the Ghana Health Service’s Patient Charter of 2010 or on the Professional Ethics of medical doctors within Ghana [15, 27]. Finally, we found that Justice Dery could have simply subpoenaed the records and waited for a more opportune time before importing the standard set in *Emmet* and *Julian* and many of such cases from other jurisdictions into the legal framework of Ghana’s jurisprudence.

Importation of Medical Malpractice into Vaah v. Lister

The decision in the *Vaah v. Lister* case procedurally imported the medical malpractice concept into an otherwise simple case. The main claim of the case was to seek the production of patient health records. There was no claim of medical malpractice against the Lister Hospital or its doctors. Medical malpractice is professional negligence arising out of the commission or omission of an act in the course of delivering medical services to another. The act may have deviated from established standards in that community or jurisdiction and may have been material to have caused injury, harm or death to the person bringing the claim or by his or her beneficiaries or dependents. In the case of a wrongful death claim, the executor or appointed administrator of the deceased patient’s estate may have the legal standing to bring such a claim on behalf of the estate. The importation of medical malpractice cases into the Ghanaian jurisprudence is therefore dangerous and has created new avenues for the already under-resourced healthcare delivery system to adversarial legal actions [31-39].

Part B: Medico-Ethical Analysis

Patient Health Information, Electronic or Otherwise

Patient health record is protected health information. The definition of protected health information includes ‘any information whether oral, written, electronic, visual, pictorial, physical or any other form, that relates to an individual’s past, present, or future physical or mental health status, condition, treatment, service, products purchased or provision of care and which (a) reveals the identity of the individual whose health care is the subject of the information, or (b) where there is a reasonable basis to believe such information could be utilized (either alone or

with other information that is, or should reasonably be known to be, available to predictable recipients of such information) to reveal the identity of that individual' [40]. While the benefits of Electronic Health Records, (EHRs) are many, there are also disadvantages. This includes abuse of privacy and confidentiality in the physician-patient relationship as well as autonomy and due process because of access to private EHRs by anonymous researchers, insurance companies, various supervisory agencies and departments. In Ghana, however, it appears that apart from a few clauses contained in the Electronic Communication Act, 2008 (Act 775) Section 4(2), limiting access to electronic personal information of the customers of the communications industry, there does not seem to be a dedicated and broad based national legislation on the primary and secondary uses of electronic personal information of the individual.

The High Court, therefore, missed a great opportunity to provide the legal framework at common law for the capture, storage and exploitation of the patients' records, electronic or traditional as well as missed the chance to articulate a sensible policy framework for the protection of privacy in Ghana. The right to privacy is neither guaranteed in the Constitution of Ghana nor in a nation like the U.S.A. where there seems to be a higher expectation of privacy [26, 31]. In the case of the U.S.A, federal law provides a basis for its protection, for example the Health Insurance Portability and Accountability Act, (HIPAA, 1996), Public Law 104-191. The right to privacy, like the right to informed consent, equity and social justice, is part of the fundamental human rights and freedoms as captured in the Constitution of Ghana (1992), Article 12-15. The dignity of all persons is inviolable, which is further protected by other areas of statutory law such as criminal and tort law [34].

The Physician-Patient Relationship and the Disclosure of Medical Errors

On the issue of medical ethics, Lister Hospital erred on many fronts. There is a plethora of studies on the imperative on physicians and hospitals to disclose medical errors that may have arisen in the course of treatment. Patients often want disclosure of all errors in treatment, why the error happened, and how the associated problems would be fixed.

The Ghana Medical Association Guiding Principles 1-2 states:

"Patients have a right to receive relevant information about their own medical condition and its management... Medical and Dental practitioners must always inform patients promptly of any significant errors that may be occurred in the course of investigation or treatment."

This principle implies that the patient has a right to his or her medical records, whether or not there is medical error. Medical error "is the failure of a planned action to be completed as intended or the use of a wrong plan to achieve an aim" [25]. Edwin, (2009) proffered that "although most doctors believe that errors should be disclosed to patients when they occur, in reality, most doctors and institutions do not disclose such mishaps to patients and their families... By not disclosing the medical error, the doctor conspicuously places his own interests above that of the patient to the detriment of the patient, thereby violating a patient-centered

ethic". Patients' access to their own medical records is one of the key numerators of disclosure of medical errors. Meyer & McDonald, (2011) defined full disclosure of a medical error "as a communication between a health care professional and a patient, family members or the patient's proxy that acknowledges the occurrence of an error, discusses what happened and describes the link between the error and outcomes in a manner that is meaningful to the patient". Disclosure is based on the principle that all patients have a right to know the details associated with unexpected outcomes that occur during their care. Disclosure of medical errors and other relevant information after an unexpected adverse event provides opportunities for compassionate, professional and patient-centered care. It also allows for increased learning that could translate into safer systems-based practices and possible repair of patient-caregiver-health system trust. They reported that at their institution, the University of Illinois Medical Center at Chicago, they have implemented a disclosure program with the following elements as part of comprehensive response to unexpected adverse events involving patient harm: (1) Reporting by notifying patient safety or risk management personnel about unexpected adverse events involving patient harm. (2) Investigating, by doing rapid and detailed investigation using standard root cause analysis techniques to determine how the error occurred. (3) Communication by creating programs that ensures ongoing communication with patients and their familiars after an unexpected adverse event without regard to the causality. (4) Apology and remedy by providing an apology and an appropriate remedy. (5) Improvements by linking corrections to the identified root cause analysis with patient and family involvement [35, 40].

CONCLUSION

It is important to bear in mind that the right to privacy is not guaranteed in the Constitution of Ghana; neither is the right to a patient's medical records. Article 21 (1) (f) guarantees the right to information, which is different from the right to privacy or patient access to medical records. The argument by courts which unilaterally make the physician an unwilling fiduciary of the patient is preposterous, because it is skewed in favor of the patient and against the equity interests of the physician. The issue of patient access to health information is complicated. There are opposing cases and research on either side of the spectrum in terms of the modalities for the release of patient's medical records in the absence of a specific legislative intent [36-40].

RECOMMENDATION

It is imperative to check the excesses of the judiciary in order to build a true participatory democracy and law making by elected officials who are accountable to, we the people.

CONFLICT OF INTEREST

Declared none.

ACKNOWLEDGEMENT

Declared none.

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